

- (3) The finding that claimant received an overpayment of temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

- (1) Claimant's injury resulted in a fifty percent (50%) loss of use of the left forearm. Claimant argues that the injury to his left forearm resulted in an injury to his right arm and the Award should, therefore, have been based upon impairment to the body as a whole. Respondent, on the other hand, argues that the fifty percent (50%) loss of use of the forearm is too high. Respondent asserts that the Administrative Law Judge improperly relied upon the opinion of Dr. Ketchum which had been increased after claimant protested that the initial rating was too low.

The Appeals Board agrees with the finding by the Administrative Law Judge that claimant's injury was a scheduled injury only, not one to the body as a whole. Claimant suffered a deep laceration of his left wrist on August 1, 1986 while operating a grinder in his employment for the respondent. He sustained no injury to his right wrist at that time. Claimant mentioned no problems with his right wrist until 1991, approximately five (5) years after the accident. In the interim between the injury to his left forearm in 1986 and the complaints to the right forearm in 1991, claimant engaged in his business hauling junk from various industries to Salina Iron and Metal. Although Dr. Ketchum describes claimant's right forearm problems as an overcompensation phenomenon, he does not attempt to indicate what activities may have attributed to the right forearm problems. Dr. Eyster, on the other hand, examined claimant on July 8, 1993 and later expressed his opinion that claimant has no permanent impairment of his right wrist. The Appeals Board concludes from the evidence claimant likely does have some impairment to his right forearm. However, the length of time between the left forearm injury and onset of symptoms on the right together with the limited specifics about claimant's activities in the interim cause the Appeals Board to conclude that the claimant has failed to sustain his burden of showing that the injury on the right is a natural probable consequence of the injury to the left, and not a separate and distinct injury attributable to some other injury or series of injuries.

The Appeals Board also finds that the fifty percent (50%) impairment found by the Administrative Law Judge reasonably measures the impairment suffered by the claimant. Although Dr. Ketchum did increase his rating, it appears to have been based upon additional information about claimant's problem, not only claimant's protest about the original rating. In addition, Dr. Eyster rates claimant's impairment at fifty percent (50%). The Appeals Board therefore finds that claimant's injury resulted in a fifty percent (50%) impairment to his left forearm.

- (2) The Appeals Board finds that an award of future medical upon proper application adequately affords claimant the opportunity for future treatment to his left forearm if necessary. While the medical record, specifically the testimony of Dr. Ketchum, suggests the possible need for ongoing regular treatment to the right, the Appeals Board finds that the requirement for specific application for future treatment on the left to be appropriate under the facts of this case.

(3) The Appeals Board finds there was an overpayment of temporary total disability benefits which respondent is entitled to offset against amounts due under this Award. If amounts have been paid by respondent in excess of the amounts due under this Award, the respondent should be reimbursed by the Kansas Workers Compensation Fund.

The record reflects that respondent paid temporary total benefits to the claimant for 149 weeks for the period August 2, 1986 through September 6, 1989 for a total of \$36,803.00. The record also reflects that during a portion of this time, claimant worked his own junk collecting business and a Karmel Korn business managed by his wife. Although claimant minimized the extent of his participation in that work, the Appeals Board finds from the record as a whole that the extent of his work was sufficient to reflect his ability to engage in substantial gainful employment and finds that he was no longer temporarily and totally disabled during the period he participated in those two businesses. The Administrative Law Judge found that claimant was entitled to temporary total disability benefits for the period August 2, 1986 through October 29, 1986 and March 22, 1989 through July 24, 1989 for a total of 30.57 weeks. On appeal the parties have not contested the finding relating to the period of overpayment, only the finding that the claimant's activities disqualified him from temporary total disability benefits. The Appeals Board affirms the finding that claimant was entitled to 30.57 weeks temporary total benefits leaving an overpayment of 118.43 weeks.

Based upon appropriate payment of 30.57 weeks of temporary total disability and a fifty percent (50%) permanent partial impairment of the left forearm claimant would, in addition to the temporary total benefits previously paid, be entitled to 84.72 weeks of permanent partial disability at the rate of \$247 per week. This award is, therefore, for a total of 115.29 weeks at \$247 per week.

At the time this case was submitted for decision, respondent had paid 149 weeks at \$247 per week and had, therefore, paid \$8,326.37 more than is here awarded. Pursuant to K.S.A. 44-525, the employer is entitled to credit against the award for any amounts paid prior to the award. If the amounts paid exceeded the award, the excess is to be reimbursed by the Kansas Workers Compensation Fund. K.S.A. 44-534a. In this case, respondent had paid, at the time the case was submitted, \$8,326.37 more than is here awarded. The \$8,326.37 and amounts paid, if any, since the submission, would be subject to reimbursement from the Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated November 29, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Linn Bickel, and against the respondent, J.H. Shears and Sons, Inc., and the insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred August 1, 1986 and based upon an average weekly wage of \$417.15, for 30.57 weeks of temporary total disability compensation at the rate of \$247 per week or \$7,550.79, followed by 84.72 weeks at the rate of \$247 per week or \$20,925.84 for a 50% permanent partial general body impairment of function making a total award of \$28,476.63.

At the time this case was submitted to the Administrative Law Judge, respondent had paid \$36,803.00 for 149 weeks. This is \$8,326.37 more than this total award. Respondent is entitled to credit for all amounts paid and entitled to reimbursement from the Kansas Workers Compensation Fund for all amounts paid in excess of this Award. The reimbursement from the Workers Compensation Fund would, therefore, include the \$8,326.37 and additional payments, if any, since the Award.

Claimant is entitled to medical expenses and unauthorized medical expenses up to \$350.00 upon proper submission of receipts.

Future medical will be considered upon proper application to the Director.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay as follows:

OWENS, BRAKE & ASSOCIATES	
Deposition of Dr. Robert Eyster dated January 31, 1994	\$192.75
Regular Hearing Transcript dated March 23, 1994	\$489.50
Deposition of Beverly Bickel dated May 20, 1994	\$249.90
JAY E. SUDDRETH & ASSOCIATES	
Deposition of Dr. Lynn Ketchum dated May 4, 1993	\$369.30

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert G. German, Salina, Kansas
John W. Mize, Salina, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director